

BEFORE THE NATIONAL LABOR RELATIONS BOARD  
UNITED STATES OF AMERICA  
REGION 19

ROUNDUP COMPANY d/b/a  
FRED MEYER STORE, INC.<sup>1</sup>

Employer

and

Cases 19-RC-14185  
19-RC-14186  
19-RC-14187

UNITED FOOD AND COMMERCIAL  
WORKERS, LOCAL 1439

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record<sup>2</sup> in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

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<sup>1</sup> The Employer's name appears as amended at the hearing.

<sup>2</sup> The brief submitted by the Employer was considered. I have taken administrative notice of my decisions in prior cases involving the meat and seafood departments of the Employer, including 36-RC-6074, 19-RC-14004, 19-RC-14051 and 14052 and the Board's decision in *Fred Meyer Alaska, Inc.*, 334 NLRB No. 94 (2001)

Unit A (19-RC-14185)

All employees working in the combination food/non-food check stand department at the Employer's facility located at 201 South Water Street, Ellensburg, Washington; excluding all other employees, the operations manager, the operations assistant manager, the operations third person in charge, guards and supervisors as defined in the Act.

Unit B (19-RC-114186)

All meat and seafood department employees working at the Employer's facility located at 201 South Water Street, Ellensburg, Washington, excluding all guards and supervisors (including the meat manager and seafood manager) as defined in the Act.

Unit C (19-RC-14187)

All employees working in the grocery department at the Employer's facility located at 201 South Water Street, Ellensburg, Washington; excluding the grocery manager, assistant grocery manager, grocery third person in charge, produce manager, service deli manager, bakery manager, and all other employees including the employees who work in the nutrition department, building service maintenance department, home department, HABA department, HCC department, photo department, apparel department and jewelry department, guards and supervisors as defined in the Act.

The Employer is engaged in the operation of a chain of retail grocery and general merchandise stores in six western states, including the store located in Ellensburg, Washington, the only facility involved herein. The parties have stipulated to the inclusions and exclusions in the three units involved herein, but differ as to the supervisory status of three individuals, the meat department manager (Unit B), the seafood department manager (Unit B) and the produce department manager (Unit C). The Employer contends these three individuals are supervisors within the meaning of Section 2(11) of the Act and the Petitioner asserts they are employees properly included in the appropriate unit. There are no disputes related to Unit A.

The Employer's retail store operations are essentially identical in their supervisory and operational structure. Wages are set centrally; each store has the same supervisory structure; all employees receive the same benefits, have common work rules, and are covered by a common handbook and policies. The meat and seafood departments in the Ellensburg facility report to the food manager, Jeff Hash, who in turn reports to the store director. Hash is also responsible for other departments, including the bakery department, the produce department, the nutrition center, the delis and the health, cards and candy department.

The Ellensburg store is a new facility, which has been open since June 2001. The initial staffing of the store was accomplished partially by transfers from other locations, but primarily through what is referred to as a "mass hire", done by the Employer's corporate offices. Some managers were hired or transferred prior to the opening of the store, but the individual departments had no input into the initial, mass hire.

The meat manager is John Pratt, the seafood manager is Denise Olson and the produce manager is Tim Gaspar. Each of those departments has three additional employees. All three

managers are responsible for ordering and maintaining the profit margin of their respective departments. However, the corporate offices maintain tight of control over the products and the display of products in the individual departments. Advertised specials are determined by the corporate offices, as is the pricing of products. The individual managers can alter prices if a product is nearing the end of its shelf life and is not selling very well. The managers also control spoilage losses through proper ordering techniques and reduction of prices of the products nearing the end of their shelf life.

All three managers schedule the employees in their departments on a weekly basis. The corporate office allocates a specific number of hours for each week. The managers prepare their weekly schedules, dividing the available hours among the employees, and submit the schedule to Food Manager Hash for approval. The hours are fairly consistent for each department, with the seafood and produce department utilizing local college students for the part-time portion of their schedules. Employees can ask for different hours on occasion. Any changes have to be approved by the department managers, but without any further action from the food manager or store director unless they are exceeding their weekly hours allotment. Overtime is requested by the individual department managers and approved by Hash. The record shows that Hash always approves overtime requests, although the requests are infrequent and generally arise when the employees cannot, within normal hours budgets, complete preparation work for sale of certain advertised specials. All three department managers are responsible for filling gaps in their schedules caused by illness or vacations.

The Employer has established corporate wide job descriptions for all three managers, including hiring, discipline, direction of the workforce and responsibility for department profit/loss.

The Employer has an established corporate hiring procedure. Applications (once initial hiring is completed) are submitted to the store's human resources department. The key screening person ("KSP") screens the applications for qualifications and initially interviews the applicant. If the applicant passes muster, the KSP refers the applicant to the department manager for an interview and approval. This procedure has not been followed in a uniform manner in the three departments at issue. The store is new and there has been very little turnover in these departments. In the seafood department there has been only one new hire since June 2001. This potential employee first contacted Hash about an opening; he worked at another, distant Employer location and was going to attend an Ellensburg college in the fall of 2001. Apparently the only possible opening was in the seafood department and Hash questioned Seafood Manager Olson about the possibility of another part-time employee. Olson's initial response was her department was at the maximum of their allocated hours and she could not fit him in, but she would ask the existing employees if any wanted to cut back their hours when school started, to make room for this new hire. The employees apparently agreed and that employee was hired without further input or recommendations from Olson.

There has been only one hire in the produce department since the June 2001 store opening, for a seasonal position during the Thanksgiving to Christmas holiday period. Again, the precise corporate policy was not followed. The individual in question knew Produce Manager Tim Gaspar and asked him if there were any openings. Gaspar knew they would need a seasonal employee and told an individual to apply to the KSP. Gaspar gave her the details of the position. Gaspar's next involvement was to schedule this individual as a new employee after she had somehow been hired. The KSP screened the individual and used the pre-screening conversations with Gaspar as a department interview. The record is not entirely clear who made the hiring decision, but after Gaspar sent her to the KSP she was hired. The

record does not show any new hire in the meat department since the store opened and only one layoff. The meat department utilized a part-time employee to fill in some schedule gaps. This employee also worked at other Employer locations and when work became slow he was laid off at Ellensburg. Meat Manager Pratt did not play any role in the decision except to provide information to Hash about the number of available hours in his department.

All three managers can and do assign specific tasks to employees. However, employees do not require much day-to-day instruction on their specific tasks. The tasks in all three departments are fairly routine and do not vary on a regular basis. All three managers are responsible for filling out a daily assignment sheet, which outlines the specific tasks to be performed by employees in 15-minute increments. While this sheet is fairly consistent, the department managers are responsible for any variations. The assignments can change depending on seasonal specials, vacations, illnesses, etc.

There is an established corporate complaint resolution procedure which provides that employees with complaints first go to their department heads. The record shows that the managers have resolved employees' minor conflicts.

There is standardized disciplinary procedure. The department managers have the authority to give "verbal" warnings, the first step in the Employer's progressive disciplinary procedure. Gaspar initiated the procedure for a written verbal warning<sup>3</sup> for one employee in the produce department. Gaspar complained to Hash about the job performance of this particular employee. The written verbal warning was authorized by Hash on Gaspar's recommendation. This is the only instance of any disciplinary actions involving any of the three managers. The department managers do not have the authority to administer any higher levels of discipline, but they are to report repeats of misconduct after the warning stage to the Grocery Manager. The department managers are responsible for completing employee evaluations, but the Employer did not show the evaluations had any impact on an employee's terms and conditions of employment.

Section 2(11) of the Act defines a supervisor as:

...[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.

To meet this definition, an individual needs to possess only one of the criteria listed (or the authority effectively to recommend same), as long as the performance of that function is not routine or clerical in nature but rather requires a significant degree of independent judgment *Kentucky River Community Care, Inc.*, 121 S. Ct. 1861 (2001). The managers in question do have the authority to hire or effectively recommend hires. While the Ellensburg facility is relatively new and there has been little experience in bringing new employees on board in these three departments, the managers possess the authority to hire pursuant to standardized corporate company wide policy. They have the same authority and responsibilities as department managers in other facilities as outlined in their common job descriptions. Even

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<sup>3</sup> "A written verbal" warning" is one step above a "verbal" warning.

though there appear to be variations from the standard hiring procedure, the authority of the managers to hire employees is not negated by such aberrations.

It must be conceded that there thus far is no real demonstrated track record of hiring by these managers, unlike the record in *Fred Meyer Alaska, Inc.*, 334 NLRB No. 94 (2001), which showed evidence that the assertedly uniform and possessed authority to hire, was also carried out to some degree. However, there is nothing in this record which invalidates the testimony that the managers possess the authority to hire or to effectively recommend same. The law is clear that mere possession is all that is required. *Fred Meyers*, supra, at Slip Op. p.4, and at fn. 8. In all past situations where I have considered the supervisory status of the Employer's meat and seafood department managers they have been found to be supervisors based in part on their abilities to hire. The produce manager falls in the same category as far as his hiring responsibilities are concerned. This factor alone is sufficient to establish supervisory status of all *three* individuals.

As a separate, alternate basis, I find that all three managers engage in "responsible direction" of employees, using independent judgment to a degree that exceeds "routine or clerical in nature". I note that all three are responsible for the ordering in their departments. This involves judgment in having sufficient inventory on hand so as not to lose sales, but not to have excess inventory so as to require markdowns. Prior case shows that subordinates, at least in the meat department, also do some of the ordering to assist the managers. The managers are responsible for moving the merchandise in time to avoid spoilage, but without excessive markdowns. Employees are expected to follow their directions and the daily scheduling requirements. The managers have the authority to adjust schedules as they see fit, within their weekly hours allotment, effectively recommend overtime and are the Employer's complaint adjustment representatives at the first level. These managers have the authority and general *responsibility* to run their departments on a daily basis without close oversight of the food manager.

It is true that the Managers cannot exercise authority to the degree required to become a supervisor in connection within most of the supervisory indicia, i.e., that in most cases they exercise judgment in these areas that does not surpass "routine" in degree. However, "responsible direction" has to mean something apart from the other supervisory indicia, otherwise Congress would not have included it as a separate indicium. One can have some responsibility regarding overtime or discipline, for example, that does not rise to the level of full supervisory authority in these areas. In such cases this "responsibility" can be combined with other elements of responsibility that do not involve the specific supervisory indicia, such as checking time cards, checking inventory, requisitioning supplies, providing guidance and instruction. It is this conglomeration of responsibility, particularly where there is no close oversight by some conceded supervisor, that can amount to "responsible direction". See *Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972). In the instant the supervisors have *the responsibility to direct* the department and are rewarded based on how efficiently the department operates. The ultimate measure of the success of the entire department is profitability, and the supervisor's reward for that success is a substantial bonus. In my view, being charged with the effective operation of the department and being charged with carrying out numerous "responsibilities" via subordinates, and especially being judged or rewarded based on the successful accomplishment of these responsibilities, as a whole demonstrates "responsibility" to "direct" the workforce with a degree of overall judgment that exceeds "routine or clerical in nature". Accordingly I conclude, on a basis independent from the hiring authority,

that the meat, grocery and produce managers are supervisors as defined in the Act, and exclude them from the appropriate units.<sup>4</sup>

There are approximately 31 employees in Unit A, six employees in Unit B and three employees in Unit C.

### **DIRECTION OF ELECTIONS**

Elections by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the units who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by United Food and Commercial Workers, Local 1439.

### **LISTS OF VOTER**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to lists of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that three eligibility lists – one for each unit- containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The lists must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the lists available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29<sup>th</sup> Floor, Seattle, Washington 98174, on or before January 18, 2002. No extension of time to file the lists may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such lists. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The lists may be submitted by facsimile transmission to (206) 220-6305. Since the lists are to be made available to all parties to the election, please furnish a total of 4 copies, unless the lists are submitted by facsimile, in which case only one copy need be submitted.

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<sup>4</sup> While the seafood manager is not eligible for a bonus in this store, he nevertheless is still charged with running the department and generating a profit.

### **NOTICE POSTING OBLIGATIONS**

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by January 25, 2002.

**DATED** at Seattle, Washington, this 11<sup>th</sup> day of January 2002.

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